Supreme Court of the United States

EDWARD LEE ROBERTS, PETITIONER-APPELLANT,

versus

COMMISSIONER OF INTERNAL REVENUE

RICHARD LEE PLOWDEN AND DALE T. PLOWDEN,
PETITIONERS-APPELLANTS,

versus

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE

PETITION FOR WRIT OF CERTIORARI

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AS THERE CONSIDERED IN ONE RECORD OF EDWARD LEE ROBERTS, NO. 71-1878 AND RICHARD LEE PLOWDEN ET UX., NO. 71-1879

EDWARD LEE ROBERTS,
No. 71-1878,
2512 Heyward Street,
Columbia, S. C. 29205,

RICHARD LEE PLOWDEN ET UX,
No. 71-1879,
916 Daly Street,
Columbia, S. C. 29205.

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INDEX

	PAGE
Table of Citations	iii
Petition	1
Appendix	7

TABLE OF CITATIONS

	Page
Subchapter S of the 1954 Internal Revenue Code	2, 3, 4
Section 6512(a) of the 1954 Internal Revenue Code	2, 3, 4, 5
Edward Lee Roberts and Richard Lee Plowden v. C.I.R., 48 T. C. 666	3
United States Constitution, Article V	2, 3, 4

Feldman v C.I.R., 47 TC 329--4

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PETITION TO APPLY FOR WRIT, OR WRITS, OF CERTIORARI TO REVIEW THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ON THE ABOVE CONSOLIDATED CASES

These two cases, as decided by the Appellate Court in Memorandum Decisions (Appendixes "A" and "B") without any direct opinions, but with reliance on the related District Court opinion (Appendix "C") as one on both matters as there consolidated, are such cases as raise important ques-

tions of Federal law as it seems should be decided by this Court. First, the District Court opinion as applied by the Appellate Court used a restricted later law of limitation, Section 6512(a) of the 1954 Internal Revenue Code, to estop any examination of the prime **inoperative law of Subchapter S** of the 1954 Internal Revenue Code as the record set forth a void corporate election (Appendix "D") showing *ab initio* a nullity in both of these proceedings of small business-corporation taxation. This presents an important question for decision of this Court as to whether a later raised limitation of Section 6512(a), **merely intended by Congress to estop parties,** may go to a far graver limitation to obscure and deny the **earlier clear inoperation** of Subchapter S due to the corporate election being thirty (30) days **outside of the strict limitation term** of Subchapter S, which fact denies *ab initio* any proper tax procedures against these petitioners. This Court does not seem to have ever decided any similar question as to whether any important tax statute, as Subchapter S here involved, could be suppressed in its operation or inoperation by invoking a later operative procedural statute as Section 6512(a) in the reliance on it by the Appellate Court in these cases. Second, the District Court opinion as adopted by the Appellate Court tacitly violated, or estopped, the fundamental operation of the United States Constitution, Article V, as it guarantees these taxpayer petitioners true possession of their property, since the subject matter of these proceedings was their property as never initially dispossessed from them due to the entire absence of any valid corporate election under Subchapter S at all times. The fiscal date of these shareholders' corporation was January 1, 1962, but the corporation application Form 2553 (Appendix "D") was dated November 1, 1961, sixty (60) days before the fiscal date. The strict limitation term of Subchapter S only permitted said corporate election to be not more than thirty (30) days

before the fiscal date, so the application being made to elect sixty days before rendered the statute of Subchapter S inoperative and the corporation election void *ab initio* and necessarily rendering any further taxation procedure against these taxpayers void in their simple shareholder capacities. There is nothing to deny the protection of Article V for their due possession of their property as it is made the subject matter of the tax procedure here. Certainly Section 6512(a) has no term to sustain any necessary tax assessments against these petitioners where the statute essential for such assessments, Subchapter S, by its term of limitation for timely election denies *ab initio* by said statute's inoperation that there ever existed a legal ground for such assessments, or later procedures on such ground against these petitioners as shareholder taxpayers. The guarantee of Article V should not be barred by inoperative Subchapter S or the later raising up of Section 6512(a) in procedures never properly sustained by inoperative Subchapter S as law of the cases.

The record of Roberts and Plowden, 48 TC 666 as relied upon by the District Court in its opinion, and thus further relied upon by the Appellate Court, shows on its face a motion timely made by these petitioners to protest the **entire want of jurisdiction** by virtue of the necessary corporate election being void *ab initio*, which motion the Tax Court denied without any opinion for such denial. This would seem to make the relief sought in this petition for *certiorari* reasonable and timely in light of the foregoing conditions, *supra*.

Thus the questions of error presented and the reasons relied upon by these petitioners in their prayers for allowance of a writ, or writs of *certiorari*, for the two consolidated cases, *supra*, are as follows:

1. The Court erred in permitting the **later** operation of a second law, Section 6512(a) to supersede the lack of

the required operation of the first law of Subchapter S, which in its body had a term of limitation defining the essential corporate election as untimely and void *ab initio*, impotent to implement any operation of Subchapter S. Thereby the Court erred in relying on Section 6512(a) as superseding the earlier limitation of Subchapter S denying any tax proceedings against these taxpayer shareholders from the outset. *Feldman v. Commissioner of Internal Revenue*, 47 TC 329. Accordingly, these taxpayer petitioners seem unduly disposed of their property as first guaranteed by Article V of the Constitution as it was defeated by undue regard for Section 6512(a) as the latter also defeated the earlier force of law of Subchapter S as the record stands.

2. The Court erred in being silent as to the pleaded force of the statute of Subchapter S as controlling these petitioners right to retain possession of their property, and when the Court in parallel failed to define the alleged force of Section 6512(a) as the Court tacitly represented Section 6512(a) as being paramount to the tax statute of Subchapter S where any control of the taxation of these shareholder petitioners was to be exercised by the Commissioner of Internal Revenue to attempt any form of tax assessments.

3. The Court erred in tacitly presuming that the true intent of Congress in enacting Section 6512(a) was to be imperative law over all prior conditions of the records or prior forces of law giving rise earlier to such conditions of the record. Such error as to the superiority of Section 6512 (a) puts in jeopardy the very constitutional guarantee of Article V as the inoperation of Subchapter S at the outset left these taxpayer petitioners in undisturbed possession of their subject property.

4. The Court erred in taking that the mutual mistakes of the parties could tacitly coerce the benefits of Subchapter S as it merely appeared **inoperative** in the records of the proceedings of the tax assessments and subsequent 48

TC 666 by mere application of 6512(a), a limitation **for parties** and not for **coercion of statutes** in any sense.

Accordingly, as this application for a writ, or writs, of *certiorari* rebounds more to the proper respect for the operation or inoperation of statutes, with the rights of these petitioners related thereto, these petitioners pray the Court here to grant their prayers set forth in this application. The conflict of tax laws raised here seem to go to the public interest as proper tax procedure affects everyone.

EDWARD LEE ROBERTS,
Pro Se (LS).

RICHARD LEE PLOWDEN,
Pro Se (LS).

DALE T. PLOWDEN,
Pro Se (LS).

Columbia, South Carolina,

Date: January 22, 1972.

VERIFICATION

PERSONALLY APPEARED BEFORE ME, Edward Lee Roberts, Richard Lee Plowden and Dale T. Plowden, who being duly sworn, depose and say that they are the petitioners named within for a writ of *certiorari*, or writs of *certiorari*, and that they have read the foregoing petition, and that the matters and things therein stated are true of their own knowledge, except those matters on information and belief ~~and as to those~~ they believe them to be true.

..... (LS)
EDWARD LEE ROBERTS,
2512 Heyward Street,
Columbia, S. C. 29205.

..... (LS)
RICHARD LEE PLOWDEN,
916 Daly Street
Columbia, S. C. 29205;

DALE T. PLOWDEN,
916 Daly Street,
Columbia, S. C. 29205.

SWORN TO before me this
27th day of January, 1972.

..... LS)
Notary Public for South Carolina.

My commission expires .....

APPENDIX

INDEX TO APPENDIX

PAGE

Appendix "A"—Edward Lee Roberts, CCA 4th Memorandum Decision No. 71-1878 9

Appendix "B"—Richard Lee Plowden et Ux, CCA 4th Memorandum Decision No. 71-1879 10

Appendix "C"—Roberts C/A 71-391 and Plowden C/A 71392, US DC Opinion and Order 11

Appendix "D"—Form 2553—Election by Plowden & Roberts, Inc., Dated November 1, 1961 .....Facing 12

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 71-1878

EDWARD LEE ROBERTS, APPELLANT,

versus

COMMISSIONER OF INTERNAL REVENUE,
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA
ROBERT F. CHAPMAN, DISTRICT JUDGE

MEMORANDUM DECISION

A review of the record and of the district court's opinion discloses that this appeal from the order of the district court is without merit. We, therefore, affirm for the reasons stated by the district court. *Roberts et al. v. Commissioner*, Civ. Action Nos. 71-391 and 71-392 (D. S. C. August 24, 1971).

The Clerk is directed to file with this memorandum decision a copy of the district court's opinion.

/s/ HARRISON L. WINTER,
United States Circuit Judge,

/s/ J. BRAXTON CRAVEN, JR.,
United States Circuit Judge,

/s/ JOHN D. BUTZNER, JR.,
United States Circuit Judge,

A True Copy, Teste:
SAMUEL W. PHILLIPS,
Clerk,
By RUSSELL W. RILEY,
Deputy Clerk.

Filed:
December 29, 1971.
SAMUEL W. PHILLIPS,
Clerk.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 71-1879

RICHARD LEE PLOWDEN AND DALE T. PLOWDEN,
APPELLANTS,

versus

COMMISSIONER OF INTERNAL REVENUE,
APPELLEE

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United States Circuit Judge.
/s/ J. BRAXTON CRAVEN, JR.,
United States Circuit Judge.
/s/ JOHN D. BUTZNER, JR.,
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December 29, 1971.
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Clerk.

Civil Actions 71-391 and 71-392

ORDER

These two actions involve the same facts and are being considered together in this one Order. The plaintiffs have brought actions in this Court seeking tax refunds for the years 1960, 1961 and 1962. The defendant has moved to dismiss both actions pursuant to Section 12(b) of the Federal Rules of Civil Procedure on the grounds that this Court lacks jurisdiction because of Section 6512(a) of the Internal Revenue Code of 1954 which grants to the Tax Court exclusive jurisdiction, where, as here, a petition to review the Commissioner's notice of deficiency is filed with the Tax Court.

The facts as to prior proceedings in this matter are not in dispute. The plaintiffs are the same parties who were before the United States Tax Court in T. C. Docket No. 5080-65 and 5081-65. The years in issue before the Tax Court were the years 1960, 1961 and 1962, the same years covered by the present action in this Court. A decision was rendered against the plaintiffs in the Tax Court case and is reported at 48 T. C. 666. An appeal was taken and the Tax Court was upheld by the United States Circuit Court of Appeals, Fourth Circuit, and a decision reported at 398 F. (2d) 340. *Certiorari* was denied by the United States Supreme Court, 89 S. Ct. 297.

Since the plaintiffs were unsuccessful in their proceedings through the Tax Court, they have now come to this Court seeking a refund. As a result of what has previously transpired in these matters, this Court does not have jurisdiction. The United States District Court is a court of limited jurisdiction. Congress has the power under the Constitution to establish courts and define their jurisdiction. With regard to cases arising under the tax laws of the United States, Congress has provided two forums, the Tax Court and the District Court. For the sake of judicial finality, Congress has made the election of one jurisdiction a foreclosing of the other. Section 6512(a) of the Internal Revenue Code of 1954 sets forth in the results of an election of the Tax Court Forum. This section states in essence

that if a tax payer [redacted] a notice of deficiency and then files a petition with the Tax Court, no suit by the tax payer for recovery of any part of the tax shall be instituted in any other court.

The law on this point is well settled. Congress has denied this Court jurisdiction over cases which have been instituted in the Tax Court except under certain circumstances which are not presented in the present set of facts. It is not the decision of the Tax Court itself which deprives this Court of jurisdiction, but the filing of the petition in the Tax Court by the plaintiffs. By electing to proceed in the Tax Court, plaintiffs have ousted this Court of jurisdiction. *United States v. Wolf*, 288 F. (2d) 147 (9th Cir. 1956); *Empire Trust Company v. United States*, 214 F. Supp. 731 (1963); *Elliott v. Johnson*, 164 F. (2d) 421 (2 C. 1947):

IT IS, THEREFORE, ORDERED that the claims of the three plaintiffs be and the same are hereby dismissed.

ROBERT F. CHAPMAN,
United States District Judge.

Florence, S. C.,
August 24, 1971.

Supreme Court
FILED
MAR
E. ROBERT

No. 71-961

In the Supreme Court of the United States

OCTOBER TERM, 1971

EDWARD LEE ROBERTS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

RICHARD LEE PLOWDEN & DALE T. PLOWDEN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General

SCOTT P. CRAMPTON,
Assistant Attorney General

LEONARD J. HENZKE, Jr.,
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In the Supreme Court of the United States

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EDWARD LEE ROBERTS, PETITIONER

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v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners [1] brought these suits for refund of 1960, 1961 and 1962 income taxes in the district court. They previously had filed petitions in the Tax Court seeking redeterminations of the deficiencies proposed by the Commissioner of Internal Revenue for the same

[1] References to "petitioners" are to Richard Lee Plowden and Edward Lee Roberts. Dale T. Plowden is a party solely because she filed joint income tax returns with her husband.

years. The Tax Court sustained the Commissioner's determinations (48 T.C. 666), and the Court of Appeals for the Fourth Circuit affirmed *per curiam* (398 F. 2d 340). This Court denied a petition for certiorari (393 U.S. 936).

More than two years later, petitioners instituted the present refund suits. The district court dismissed these suits for want of jurisdiction because petitioners' tax claims for the years in issue had already been heard and adjudicated by the Tax Court. The court of appeals, in a yet unreported decision, affirmed *per curiam* on December 29, 1971. The petition for a writ of certiorari was filed on January 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The decision below, affirming the dismissal order of the district court, is correct. There is no conflict of decisions or any other reason for further review.

With exceptions not here relevant, Section 6512(a) of the Internal Revenue Code of 1954 grants to the Tax Court exclusive jurisdiction to redetermine a taxpayer's entire tax liability for any taxable year as to which a petition has properly been filed in the Tax Court. Since petitioners filed petitions in the Tax Court before instituting these refund suits for the same years, that court had exclusive jurisdiction over petitioners' tax liabilities for the years in issue. The district court accordingly was correct in dismissing petitioners' complaints. *United States* v. *Wolf*, 238 F. 2d 447 (C.A. 9); *Elbert* v. *Johnson*, 164 F. 2d 421 (C.A. 2); *Empire Trust Co.* v. *United States*, 214 F. Supp. 731, affirmed, 324 F. 2d 507 (C.A. 2).

Res judicata also bars petitioners' relitigation of their tax liabilities for 1960–1962 in the district court. The new issue they seek to raise (Pet. 2) involves transactions which occurred in 1961 and 1962. Since petitioners have already litigated their causes of action for those tax years to a final judgment on the merits, they are bound by the results, and may not relitigate either the issues determined or those that could have been determined in the earlier litigation. *United States* v. *International Building Co.*, 345 U.S. 502, 506; *Commissioner* v. *Sunnen*, 333 U.S. 591.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

LEONARD J. HENZKE, JR.,
MARY J. MCGINN,
Attorneys.

MARCH 1972.

U.S. GOVERNMENT PRINTING OFFICE 1972